

1 E-filed on 9/20/06

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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12 IN RE CYGNUS TELECOMMUNICATIONS
13 TECHNOLOGY, LLC, PATENT
14 LITIGATION

No. MDL-1423
This Order Applies to

C-06-03843 RMW
C-06-04295 RMW

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THIS ORDER RELATES TO:

ORDER RE NEWLY-ADDED MDL
ACTIONS

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18 On September 8, 2006, the court issued an order to show cause why defendants in two
19 actions transferred to this court by the MDL Panel should not be required to abide by this court's
20 June 21, 2006 scheduling order. The order to show cause also discussed a case for which transfer to
21 this court is pending and ordered plaintiff to "inform the court of any cases pending in other districts
22 that the MDL Panel is likely to transfer here."

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I. CYGNUS v. AMERICAN INTERNATIONAL TELEPHONICS

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25 Cygnus initiated the action *Cygnus Telecommunications Technology, LLC v. American*
International Telephonics, LLC, on January 26, 2006 in the Central District of California as case no.
26 06-cv-00508-DT-SS. By order dated May 18, 2006, the MDL Panel ordered the case transferred
27 here. The clerk of this court received the file from the Central District on June 20, 2006; the action
28 is now pending here as case no. C-06-03843.

1 Only defendants International Telecom Exchange Group, Inc. ("ITEG") and TremCom
 2 International, Inc. have had counsel enter an appearance in the case; they are represented by the
 3 same attorney. On June 21, 2006, the court issued a scheduling order setting dates leading up to a
 4 claim construction hearing on November 20, 2006. The scheduling order did not refer to case no. C-
 5 06-03843 and the court did not mail a copy of that order to defense counsel in that action. The
 6 court's next order, however, was a miscellaneous order dated July 14, 2006, and was mailed to
 7 defense counsel in that action. In that order, the parties were instructed to discuss the feasibility of
 8 ITEG and TremCom following the June 21, 2006 scheduling order. The defendants' liaison counsel
 9 reported back that counsel for ITEG and TremCom was unwilling to participate because she thought
 10 (erroneously) that the case had not yet been transferred here.

11 A hearing was held before the court on August 18, 2006 to work out details of the schedule
 12 leading up to the November 20 claim construction hearing. The court issued an order setting dates
 13 on August 21, 2006. Counsel for ITEG and TremCom states that she received this order on
 14 September 4, 2006.

15 ITEG and TremCom responded to the September 8, 2006 order to show cause. They argue
 16 that they cannot in the short time remaining prepare for a claim construction hearing on November
 17 20. They also state that ITEG did not use any technology covered by Cygnus's patents and that
 18 TremCom formerly made limited use of call-back technology but no longer do so, and that they have
 19 made a settlement offer to Cygnus.¹

20 Had ITEG and TremCom begun participating in this action upon receipt of the July 14, 2006
 21 order, the court would have been more receptive to their arguments that there is insufficient time for
 22 them to prepare for the November 20, 2006 hearing. ITEG and TremCom could have appeared at
 23 the August 18, 2006 hearing and been able to present their positions on the current schedule.
 24 However, given the nature of the case, the materials available to ITEG and TremCom and the
 25 number of other defendants with similar interests, the court finds that ITEG and TremCom can and

26 ¹ ITEG and TremCom state that "Neither Defendants nor their counsel has been served with or
 27 otherwise seen the June 21, 2006 Scheduling Order." That order is available on the court's
 28 electronic filing system on the master docket for this MDL action. It seems odd that ITEG and
 TremCom would not have seen or obtained a copy of the order by September 13, 2006. Defendants
 do not state whether or not they received the court's July 14, 2006 order.

1 shall adhere to the schedule set by the court leading up to the November 20, 2006 claim construction
2 hearing.

3 The court is aware that under that schedule, the parties must submit a joint claim
4 construction statement to the court on September 22, 2006. The court will give ITEG and TremCom
5 until October 18, 2006 to file a separate claims construction statement on any claim term that they
6 submit should be defined differently than proposed by any defendant.² ITEG and TremCom should
7 be aware that Kieran Fallon has been appointed liaison counsel for the defendants in this MDL
8 proceeding, and said counsel will act as liaison counsel for ITEG and TremCom absent a showing of
9 good cause why he should not so act.

II. CYGNUS v. WORTHINGTON

11 Plaintiff initiated *Cygnus Telecommunications Technology, LLC v. Worthington* in the
12 District of Arizona on February 17, 2006 as case no. 06-cv-00515-FJM. The case was ordered
13 transferred here by the MDL Panel and was received on July 13, 2006 and assigned case no.
14 C-06-04295. No defendant has yet been served.

15 In response to this court's September 8, 2006 order to show cause, Cygnus reports that it has
16 attempted to serve the defendants in that action but that they "have evaded service of process."
17 Cygnus also states that it has hired a private investigator in an attempt to track the defendants down.
18 Cygnus requests until December 15, 2006 to attempt to serve the defendants.

19 Rule 4(m) requires service to be made "within 120 days after the filing of the complaint."
20 Cygnus has failed to effect service upon any of six defendants for approximately 210 days since it
21 filed its complaint in this action. Rule 4(m) also provides that "if the plaintiff shows good cause for
22 the failure, the court shall extend the time for service for an appropriate period." The court will give
23 Cygnus the additional ninety days its requests, but the court expects Cygnus to have commenced
24 service by publication by the end of the extension period if personal service has not been effected. If
25 any defendant in this action remains unserved on December 15, 2006, Cygnus shall show cause by

27 ² Were the court not to require ITEG and TremCom to participate in the November 20, 2006 claim
28 construction hearing, the court anticipates that after it issued a claim construction order, either ITEG
and TremCom or Cygnus would argue that that order should be given preclusive effect against the
other side.

1 declaration filed by December 20, 2006 why that defendant has not been served, and why a further
 2 extension would be "an appropriate period" under Rule 4(m).

3 **III. CYGNUS v. MAJOSA**

4 The action *Cygnus Telecommunications Technology, LLC v. Majosa Communications Corp.*,
 5 pending in the Central District of California as case no. 05-cv-04272-R-CT, was ordered transferred
 6 here by the MDL Panel on August 25, 2005. It is unclear why the file has not been physically
 7 transferred. In any event, the clerk of this court requested transfer of the file from the Central
 8 District of California on August 14, 2006, but has not yet received it. Cygnus reports that both
 9 defendants in that action have been served. Upon receipt by the clerk of this court of the case file
 10 from the Central District of California, Cygnus shall serve this order, the June 21, 2006 scheduling
 11 order, and the August 21, 2006 order setting dates upon both defendants in this action, and within
 12 thirty days of such service, the parties shall submit to the court a joint scheduling proposal
 13 addressing the best way to integrate this action into MDL proceedings here.

14 **IV. OTHER ACTIONS**

15 In the September 8, 2006 order to show cause, plaintiff was instructed to "inform the court of
 16 any cases pending in other districts that the MDL Panel is likely to transfer here." Plaintiff did not
 17 identify any such cases. To assist the court with scheduling, if Cygnus initiates any new actions for
 18 infringement of U.S. Patent Nos. 5,883,964 or 6,035,027 in any court, Cygnus shall inform this court
 19 within five business days.

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22 DATED: 9/20/06


 23 RONALD M. WHYTE
 United States District Judge

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1 **A copy of this order was mailed on _____ to:**

2 **Counsel for Plaintiff:**

3 John P. Sutton
2421 Pierce Street
4 San Francisco, CA 94115-1131

5 Gregory J. Nelson
Nelson & Roediger
6 3333 E Camelback Road
Suite 212
7 Phoenix, AZ 85018

8 Peter Neil Greenfeld
Greenfeld Law Group
9 3333 E Camelback Road
Suite 212
10 Phoenix, AZ 85018-2324

Counsel for Defendants:

Kieran Patrick Fallon
436 SW 8th Street
Miami, FL 33130-2814

Meredith L. Caliman
Meredith L. Caliman Law Offices
3858 Carson Street, Suite 120
Torrance, CA 90503-6705

Courtesy Copy:

Clerk of the Panel
Judicial Panel on Multidistrict Litigation
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Room G-255, North Lobby
Washington, DC 20002-8004

12 Counsel shall distribute copies of this order to co-counsel, as necessary.

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